No. 84-68

In The
Supreme Court of the United States
October Term, 1984

KERR-McGEE CORPORATION,
Petitioner,
v.
THE NAVAJO TRIBE OF INDIANS, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

ALVIN H. SHRAGO (Counsel of Record)
STEPHEN D. TREUER
EVANS, KITCHEL & JENCKES, P.C.
2600 North Central Avenue
Phoenix, Arizona 85004-3099
Tel. (602) 234-2600

Counsel for Petitioner
Kerr-McGee Corporation

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

I. Introduction

At issue in this case is "the administrative process established by Congress" and explicitly relied upon by this Court in *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 155 (1982), that Indian tribes must follow in taxing nonmembers. Such a procedure, which not even the respondents claim to be unfair to them, is simply part of the supervision that the United States Government has exercised over Indian affairs since the birth of this Nation.

Neither the respondents nor the United States dispute that intercourse between Indians and non-Indians has traditionally been supervised by the Secretary of the Interior. Nor do they dispute that petitioner could not have even commenced its oil and gas operations on the Navajo Reservation without approval from the Secretary.[1] Yet the respondents and the United States advance the notion that all of a sudden Indian tribes may unilaterally tax the very non-Indian oil and gas operations for which Congress explicitly required both initial Secretarial approval and continued Secretarial supervision. 25 U.S.C. § 396a and § 396d.

This notion is based on the erroneous premise that existence of an inherent tribal power to tax means that such a power can be exercised unconstrained by any limitations except those imposed by a tribe upon itself. And since the Navajo Tribe (so the argument goes) has not required its tax ordinances to be approved by the Secretary, the taxes are valid and effective without Secretarial approval. Of course, in structuring this argument, both the respondents and the United States have not even

[1] In fact, the respondents point out that the Secretary's supervision of tribal affairs even includes "approving the expenditure of tribal funds." *Respondents' Brief* at 27.

bothered to cite, much less to address, *Rice v. Rehner*, — U.S. —, 77 L.Ed.2d 961 (1983), where this Court rejected the notion that Indians are "super-citizens" free from all but "self-imposed regulations." *Id.* at —, 77 L.Ed.2d at 979. *See also Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 165 (1980) (Brennan, J., dissenting) ("Indian reservations do not partake of the full territorial sovereignty of States or foreign countries.").

Even more incredible, however, is the almost total disregard that the respondents and the United States have shown for *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). While they are quick to cite *Merrion* for the proposition that Indian tribes have inherent power to tax non-Indians, they persistently avoid the holding in *Merrion* that an Indian tribe cannot tax non-members without first obtaining approval from the Secretary.[2] The respondents contend that "the need for Secretarial approval in *Merrion* arose from the provisions of *tribal* law." *Respondents' Brief* at 11, 25 (emphasis in original). The United States contends that "The requirement of Secretarial approval is not, however, a result fairly attributed to Congress . . . [but] [r]ather . . . a discretionary decision of the Bureau of Indian Affairs." *United States' Brief* at 11. These assertions fly flagrantly in the face of the explicit holding

[2]The *Merrion* Court itself distinguished between the existence and the exercise of an inherent power to tax. Justice Marshall emphasized that while "neither the Tribe's Constitution nor the Federal Constitution is the font of any sovereign power of the Indian tribes," 455 U.S. at 148 n.14, an amendment to the tribal Constitution authorizing exercise of the power was "the critical event necessary to *effectuate* the tax." *Id.* (emphasis by the Court). The Court also explained that Secretarial approval is a constraint that "minimize[s] potential concern that Indian tribes will *exercise* the power to tax in an unfair or unprincipled manner. . . ." *Id.* at 141 (emphasis added).

in *Merrion* that Secretarial approval is an integral part of "the administrative process *established by Congress* to monitor such exercises of tribal authority." 455 U.S. at 141 (emphasis added).

The United States and the respondents altogether ignore the explanation in *Merrion* that Secretarial approval is an additional constraint that:

> [M]inimize[s] potential concern that Indian tribes will exercise the power to tax in an unfair or unprincipled manner, and ensure[s] that any exercise of the tribal power to tax will be consistent with national policies.

455 U.S. at 155. Indeed, such federal supervision is essential since Indian tribes are not bound by the Bill of Rights and the fourteenth amendment and since the constraints on tribal power theoretically[3] set forth in the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301 *et seq.*, are incapable

[3]The constraints are only theoretical since they cannot be enforced by private litigants against any tribal institution, not even a tribal court. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). Thus, to relegate such rights for resolution in a tribal court would require an assumption of tribal court cooperation in correctly interpreting and applying federal law. This Court has previously refused to premise its decisions on such assumptions of cooperation, even in the context of courts against which Constitutional constraints are enforceable. *Arizona v. San Carlos Apache Tribe*, — U.S. —, —, 77 L.Ed.2d 837, 857 (1983) (rejecting arguments of the United States and the Navajos that "assume a cooperative attitude on the part of state courts . . . which is neither legally required nor realistically always to be expected."). *See also Cohens v. Virginia*, 5 U.S. (6 Wheat.) 264, 386 (1821) (explaining that the judicial power of the United States in article III of the Constitution must be respected because "It would be hazarding too much to assert, that the judicatures of the states will be exempt from the prejudices by which the legislatures and people are influenced, and will constitute perfectly impartial tribunals."); *Martin v. Hunter's Lessee*, 4 U.S. (1 Wheat.) 304, 331 (1816).

There is no basis for assuming that tribal courts will cooperate in correctly interpreting and applying federal law. In

(Continued on next page)

of enforcement by anyone other than the Secretary of Interior.[4]

The enormous potential for mischief if Indian tribes are not required to follow the administrative process established by Congress to monitor exercises of tribal authority is illustrated by the Ninth Circuit's recent decision in *Moapa Band of Paiute Indians v. United States Department of Interior*, 747 F.2d 563 (9th Cir. 1984), which both the United States and the respondents are content to ignore. In that case, the Court of Appeals upheld the Secretary's refusal to approve an Indian tribe's ordinance encouraging prostitution on the reservation because the tribal constitution "empowers" the Secretary to rescind

(Continued from previous page)

fact, the Presidential Commission on Indian Reservation Economies recently acknowledged that "[T]he failure to establish a clear separation of powers between the tribal council and the tribal judiciary has resulted in political interference with tribal courts, weakening their independence, and raising doubts about fairness and the rule of law." *Report and Recommendations of the Presidential Commission on Indian Reservation Economies* at 25 (November 1984). *See also* Getches, Rosenfelt & Wilkinson, *Federal Indian Law Cases and Materials* at 319-321 (1979); Brakel, *American Indian Tribal Courts: Separate? "Yes," Equal? "Probably Not"*, 62 A.B.A.J. 1002 (1976). Such political interference is patently obvious in the case of the Navajo Tribal Council, which created the "Supreme Judicial Council" to review all decisions of the Navajo Courts in which a tribal council resolution has been held invalid. 7 N.T.C. § 323(1). Five of the seven voting members of the Supreme Judicial Council are members of the very Tribal Council whose resolution is at issue. 7 N.T.C. § 322. This Court has consistently disapproved of judicial systems that do not permit decision-making by impartial, disinterested judges. *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973); *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972).

[4]For example, on December 5, 1983, the Department of the Interior invalidated the Hopi Tribe's proposed Coal Severance Tax on the grounds, among others, that it violated the due process provision of the Indian Civil Rights Act, 25 U.S.C. § 1302(8). (The Assistant Secretary's letter disapproving this tax is reproduced as Appendix AA at the end of this reply brief.)

an ordinance for any cause. *Id.* at 565.[5] Under the notion advanced by the United States and the respondents in the present case, the Moapa Tribe could proceed with its prostitution ventures if it did not have a constitution at all or if it amended its constitution to delete the Secretarial oversight provisions.[6] In fact, the United States reveals that "the Department [of the Interior] today encourages the elimination of the traditional Secretarial review clauses in tribal constitutions", *United States' Brief* at 5-6, and admits that Secretarial approval clauses in several tribal constitutions have already been removed. *Id.* at 16-17.

The Interior Department does not have any claimed "statutory discretion" (*United States' Brief* at 2) to disregard "the administrative process established by Congress to monitor such exercises of tribal authority." *Merrion*, 455 U.S. at 155.

[5]The notion that the Secretary of the Interior obtains his authority from Indian tribes, which may or may not "empower" him to supervise Indian affairs, is absurd. The Secretary is an official of the United States and is empowered by the Congress of the United States to supervise Indian affairs. *See Roger St. Pierre v. Commisisoner of Indian Affairs*, 89 I.D. 132, 151 (1982) ("Tribal constitutions cannot limit the power of the United States, a superior sovereign, any more than a state constitution could.").

[6]On this point, the Government has taken inconsistent positions. On the one hand, it urges this Court to defer to "the continuing administrative view that Congress never directed the Secretary to insist upon review of tax ordinances", *United States' Brief* at 18—notwithstanding this Court's explicit recognition of the IRA as "the administrative process established by Congress to monitor such exercises of tribal authority." *Merrion*, 455 U.S. at 155. On the other hand, the Government asserts that the Bureau of Indian Affairs has "power independent of the I.R.A. and the Tribe's constitution to screen and veto some or all tribal enactments." *United States' Brief* at 18. In what Act of Congress has the Bureau of Indian Affairs been given such broad power independent of the IRA to disregard the "administrative process established by Congress to monitor such exercises of tribal authority", *Merrion*, 455 U.S. at 155, by screening and vetoing tribal ordinances at the untrameled whim of political appointees?

II. The Respondents And The United States Urge This Court To Disregard The Legislative History And Early Interpretations Of The Indian Reorganization Act Of 1934.

Relying on sections 16 and 17 of the Indian Reorganization Act of 1934, 25 U.S.C. §§ 476 and 477 (hereinafter "IRA"), the *Merrion* Court explained that "Here, Congress has affirmatively acted by providing a series of federal checkpoints that *must* be cleared before a tribal tax can take effect." 455 U.S. at 155 (emphasis added). These checkpoints—amendment of the Tribal Constitution to announce tribal intention to tax nonmembers and Secretarial approval of the tax itself—are integral parts of "the administrative process established by Congress to monitor such exercises of tribal authority." *Id.*

The respondents' efforts to avoid the requirement of Secretarial approval confirmed in *Merrion* are premised on extraordinary self-contradiction and oversight. They argue that the IRA was not intended "to generate distinctions between tribes which did and did not wish to reorganize", *Respondents' Brief* at 7, and that the purpose of the IRA "was not to shape tribal government or make it more amenable to federal control." *Id.* at 8. Yet, they seek this Court's imprimatur on a distinction that makes those tribes which organized under the IRA more amenable to federal control than those tribes which rejected the IRA. The United States has conceded that it "may seem odd that . . . most of the Tribes that accepted the I.R.A. are . . . less independent." *United States' Brief* at 16. It is both odd and illogical. It is also contrary to the IRA's legislative history and its contemporaneous interpretation by the Bureau of Indian Affairs.

The United States does not dispute the correctness of the legislative history of the IRA cited by petitioner,[7] which was based primarily on the statements made by both the Senate and the House sponsors as well as the author of the legislation, Indian Commissioner John Collier, himself. *See Petitioner's Brief* at 23-32. These statements are entitled to substantial weight, as this Court has repeatedly recognized. *E.g., Lewis v. United States,* 455 U.S. 55, 63 (1980) ("Inasmuch as Senator Long was the sponsor and floor manager of the bill, his statements are entitled to weight."); *Federal Energy Administration v. Algonquin Sng, Inc.,* 426 U.S. 548, 564 (1976) ("As a statement of one of the legislation's sponsors, this explanation deserves to be accorded substantial weight in interpreting the statute.").

In fact, the United States readily concedes the "prevailing administrative view in the mid-1930s, and continuing for some time thereafter, to the effect that tribal taxation of non-Indians . . . generally *ought* to be supervised by the Bureau of Indian Affairs." *United States' Brief* at 15 (emphasis in original). As this Court has repeatedly recognized, "Administrative interpretations are especially persuasive where, as here, the agency participated in developing the provision." *Miller v. Youakim,* 400 U.S. 125, 144 (1979). *See also Aluminum Co. of America v. Central Lincoln Peoples' Utility District,* — U.S. —, —, 81 L.Ed.2d 301, 310 (1984) (acknowledging the deference due to "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new."); *United States v. Vogel*

[7] Indeed, the Interior Board of Indian Appeals cited much of the same legislative history in *Roger St. Pierre v. Commissioner of Indian Affairs,* 89 I.D. 132, 144-45 (1982).

Fertilizer Co., 455 U.S. 16, 31 (1982) ("[W]e necessarily attach 'great weight' to agency representations to Congress when the administrators 'participated in drafting and directly made known their views to Congress in committee hearings.'").

Incredibly, the United States suggests that instead of respecting the contemporaneous administrative interpretation of the IRA, this Court should blatantly disregard statements of Indian Commissioner Collier and others as "exaggerated representations occasionally . . . made by zealous officials of the Bureau of Indian Affairs. . . ." *United States' Brief* at 15. Moreover, the United States admits that "without any change in statutory law", *Id.* at 16, the Bureau of Indian Affairs in recent years has disavowed its role of reviewing and approving tribal tax ordinances. There is no basis whatsoever for this curious invitation to repudiate the legislative history and immediate post-enactment administrative interpretations with which the Government does not presently agree.[8] To the contrary, as this Court admonished in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), "We have declined to follow administrative guidelines in the past where they conflicted with earlier pronouncements of the agency." *Id.* at 143. Indeed, it is truly astonishing that the United States again attempts precisely what this Court rejected less than two years ago:

[8]When the Government finds legislative history and initial administrative interpretations of Indian statutes to its liking, it forcefully argues for respect and deference from this Court. *See Brief for the United States* at 17-23, *Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana*, No. 84-262 (involving an Indian statute enacted ten years before the IRA); and *Brief for the United States* at 19-28, *State of Montana v. Blackfeet Tribe*, No. 83-2161 (involving an Indian statute enacted four years after the IRA).

> Although administrative interpretation changed in 1971, . . . it is clear that the early interpretation by the Bureau of Indian Affairs favors the [petitioner's] position. As that early position is consistent with the view of Commissioner Myer, whose Bureau revised HR 1055, it is surely more indicative of congressional intent in 1953 than a 1971 opinion to the contrary.

Rice v. Rehner, — U.S. —, —, 77 L.Ed.2d 961, 977 n.13 (1983).

The respondents contend that the IRA was not designed for utilization by the Navajos,[9] but instead for the "rebuilding of atrophied tribal governments."[10] *Respondents' Brief* at 14. On the contrary, the principal author of the IRA, Commissioner Collier, explained that the IRA was specifically intended to be applicable to the Navajos:

> This would allow the Navajo Indians, if they wanted to, to set up a community self-governing affair, and at once or gradually broaden its sphere until it became like a complete town government.

[9]The suggestion that the Navajos may have rejected the IRA because they already had a "functioning government", *Respondents' Brief* at 13, is belied by the November 24, 1936 Resolution of the Navajo Tribal Council, which explicitly recognized that the "sole purpose" for which the Navajo Tribal Council had been organized was that of "making oil and gas leases in behalf of the tribe" and that the authority of the Council to deal with other matters was "inadequate". *See Petitioner's Brief App.* A at 1.

[10]Their only "support" for this assertion is a mischaracterization of a remark made by Representative Hastings of Oklahoma, 78 Cong. Rec. 11,739 (1934), an opponent of the IRA who decided to support the IRA only after the Oklahoma Indians were excluded from its coverage. See 25 U.S.C. § 473. Representative Hastings never said that some tribes still retained a "functioning" government as respondents would have this Court believe. *Respondents' Brief* at 13. Rather, he said that "Some of the Indian tribes in the western states retain *some form* of Indian government, as a council or business committee, with *authority to make representations* on behalf of their respective tribes." 78 Cong. Rec. 11,739 (1934) (emphasis added).

To Grant To Indians Living Under Federal Tutelage The Freedom To Organize For Purposes Of Local Self-Government And Economic Enterprise: Hearings on S.2755 and S.3645 Before The Senate Comm. On Indian Affairs, 73d Cong., 2d Sess. 68 (1934). *See also* Commissioner Collier's comments and explanations at pages 70 and 96 of the Senate Hearings. Indeed, Senator Wheeler, the sponsor of the IRA in the Senate, declared that "I thought it [the IRA] would work among the Navajos and the Indians in New Mexico and Arizona if it would work any place." *Id.* at 145. And Commissioner Collier explained in his April 5, 1934 letter to the Navajo Tribal Council and the Navajos that the Navajos should "give a strong expression . . . urging Congress to enact the Wheeler-Howard Bill [because] . . . the Navajos . . . need the Wheeler-Howard Bill." *See Petitioner's Brief App.* C at 5.[11] The respondents contend that these statements should be disregarded because they were made before the Wheeler-Howard bill was revised to make the tribal self-government provisions optional. *Respondents' Brief* at 15 n.9. This is incorrect. Even the original version of the bill permitted any tribe to reject the charter to be issued by the Secretary. H.R. 7902, 73d Cong., 2d Sess., Title 1 — Indian Self-Government, § 2, *reprinted in Readjustment of Indian Affairs: Hearings on H.R 7902 Before the House Comm. on Indian Affairs*, 73d Cong., 2d Sess. 1-2 (1934). In addition, Commissioner Collier explained on the very date of enactment that "The essentials of the Wheeler-Howard bill, as originally introduced, are contained in the House and Senate drafts as reported by the committees of these bodies." *Letter dated June 15, 1934, from Commissioner Collier to Representative Frear, reprinted in* 78 Cong. Rec. 11,743 (1934). Immediately preceding the House vote on the bill, Representative Frear explained that:

> [T]he bill in its earlier form as introduced had the same principles as the bill now awaiting a vote. What have been changed are the details and the mechanisms of the bill, but not the principles of the bill, and that, I understand, is why the President, by personal letter, Secretary Ickes, and Indian Commissioner Collier are urging the pending bill just as earnestly as they favored the original draft.

78 Cong. Rec. 11,743 (1934).

The respondents point to the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450 *et seq.*, and the Indian Financing Act of 1974, 25 U.S.C. §§ 1451 *et seq.*, as "evidence" that current Congressional objectives are to strengthen tribal governments by eliminating federal supervision and control irrespective of whether a tribe is organized or unorganized under the IRA.[12] *Respondents' Brief* at 2, 19. To the contrary, both of these later Acts of Congress provide not only for additional ties between Indian tribes and the Secretary of the Interior, but also for continued oversight responsibilities on the part of the Secretary of the Interior. For example, 25 U.S.C. § 450m specifically empowers the Secretary to rescind a contract or grant agreement and to assume full control over the program, activity or service involved

[11] The Navajo Tribal Chairman expressed his tribe's support for the IRA and urged Congress to enact it. See April 12, 1934 letter from Thomas P. Dodge to Representative Edgar Howard, *reprinted in Readjustment of Indian Affairs: Hearings on H.R. 7902 Before the House Comm. on Indian Affairs*, 73d Cong., 2d Sess. 405 (1934).

[12] Of course, respondents do not dare suggest that the IRA—which some amici have described as "one of the most important pieces of Indian legislation in American history", *Brief of Amici Curiae Shoshone Indian Tribe, et al.* at 13—has been repealed by any newer legislation.

whenever the "Secretary determines that the tribal organization's performance under such contract or grant agreement involves (1) the violation of the rights or endangerment of the health, safety, or welfare of any persons. . . ." The Indian Financing Act of 1974 is replete with provisions setting forth extensive Secretarial supervision over loans and loan guarantees to Indian tribes — including the power to "cancel, adjust, compromise, or reduce the amount of any loan or any portion thereof . . . when such action would, in his [the Secretary's] judgment, be in the best interests of the United States." 25 U.S.C. § 1465. *See also* 25 U.S.C. §§ 1461, 1463, 1466, 1469, 1482, 1483, 1484, 1496 and 1524. In short, these statutes illustrate that in recent years the Congress has seen fit to continue the traditional federal supervision over both organized tribes and unorganized tribes.

There is no merit to the respondents' attempt to explain their refusal to adopt a Constitution under the IRA on the asserted belief that the Treaty of 1868, 15 Stat. 667, protected their right of self-government.[13] *Respondents' Brief* at 16. None of the publications cited by respondents discloses any such "belief" on the part of the Navajos. To the contrary, if the Navajos "believed" that

[13]The respondents do not explain what treaty provision guarantees them the right to exercise powers of self-government free of federal supervision. To the contrary, Articles I, IV, V, VII and VIII of the Treaty of 1868 require extensive involvement of the Commissioner of Indian Affairs in the affairs of the Navajos. In fact, the day before the treaty was executed, the agent for the Navajo Indians recommended that a reservation be set aside for the Navajos so that "their agent can keep an eye upon them and their acts and provide for their necessities." Letter dated May 30, 1868 from Theodore H. Dodd to Lt. Gen. W.T. Sherman and Col. S.F. Tappan, *reprinted in Treaty Between the United States of America and the Navajo Tribe of Indians* 13, 15 (KC Publications; Flagstaff, Az. 1968) (Library of Congress 68-29989).

their self-government was guaranteed by their treaty, they would have had no reason less than two years after their rejection of the IRA in 1935 to petition Congress for "The granting of self-government to the Navajo people by a gradual, orderly, and systematic advance . . . ." *Survey of Conditions of Indians in the United States: Hearings on S.858 Before the Senate Comm. on Indian Affairs,* 76th Cong., 1st Sess. 20,915 (1937). Similarly, there would have been no need for the Congress to have offered the Navajos a second opportunity to organize under section 6 of the Navajo-Hopi Rehabilitation Act of 1950, 25 U.S.C. § 636, if this right was already available under the treaty.[14] *See United States v. Anderson,* 625 F.2d 910, 916 (9th Cir. 1980) (Acknowledging as to rejection of the IRA that "If the Tribes wish to be relieved from the effects of their negative vote, they must seek such relief from Congress.").

III. There Is No Judicial Authority That Exempts Unorganized Tribes From Federal Supervision.

Both the Government and the respondents have miscited judicial authority to support their claim that Secretarial approval of tribal tax ordinances is unnecessary. Although they cite *New Mexico v. Mescalero Apache Tribe,* — U.S. —, 76 L.Ed.2d 611 (1983), a hunting and fishing rights case, for the proposition that encouraging tribal

[14]In addressing this second Congressional invitation for the Navajos to adopt a constitution, the Solicitor again confirmed the role of Secretarial approval in his June 21, 1954 opinion:

> Under that language [set forth in 25 U.S.C. § 636], the powers which the tribe may exercise, *with Secretarial approval,* are first those powers which are vested in the tribe "by existing law."

II *Opinions of the Solicitor of the Interior Relating to Indian Affairs* 1641, 1642 (emphasis added).

self-sufficiency is a Congressional objective *(Respondents' Brief* at 11; *United States' Brief* at 1-2), they overlook this Court's unanimous holdings in that case that "Federal law commits to the Secretary and the Tribal Council the responsibility to manage the reservation's resources" (— U.S. at —, 76 L.Ed.2d at 624) and that "[F]ederal law *requires* the Secretary to review each of the Tribe's hunting and fishing ordinances." *Id.* at —, 76 L.Ed.2d at 623 (emphasis added). Similarly, although they cite *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134 (1980), for the proposition that non-IRA tribes may tax non-Indians *(Respondents' Brief* at 14, 17; *United States' Brief* at 25), they overlook the fact that all of the tribes involved in that case had adopted tribal Constitutions and had obtained specific Secretarial approval of the taxes. 447 U.S. at 143 n.11, 144. This, of course, fulfilled "the administrative process established by Congress to monitor such exercises of tribal authority." *Merrion,* 455 U.S. at 155.

Incredibly, the United States seeks to distinguish the very judicial authority on which this Court relied in *Merrion* to uphold the federally approved severance tax of the Jicarilla Apache Tribe.[15] It now contends that these cases are limited to "the special case of the Five Civilized Tribes [of Oklahoma]", *United States' Brief* at 10, even though it cited these same cases to this Court in *Merrion* for the proposition that Indian tribes everywhere have the inherent power to tax. *Brief for the United States* at 9-10, *Merrion v. Jicarilla Apache Tribe,* No. 80-11. And of course, this Court in *Merrion* analyzed these cases at

[15]*Morris v. Hitchcock,* 194 U.S. 384 (1904); *Buster v. Wright,* 135 Fed. 947 (9th Cir. 1905), *app. dismissed,* 203 U.S. 599 (1906); and *Maxey v. Wright,* 54 S.W. 807 (Ct.App.Ind.Terr.), *aff'd,* 105 Fed. 1003 (8th Cir. 1900).

great length before citing them as authority for the proposition that all Indian tribes have inherent power to tax. 455 U.S. at 141-144. Unless this Court is willing to revisit *Merrion,*[16] it is too late in the day for the United States to suggest that the early Oklahoma cases are of limited application.

Respondents cite *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978), for the mistaken proposition that this Court has "recognized" that the Constitution of the Santa Clara Pueblo did not require Secretarial approval of tribal ordinances. *Respondents' Brief* at 17. To the contrary, Article IV, Section 1, paragraph 5, of the Constitution of the Pueblo of Santa Clara explicitly provides "That any ordinance which affects persons who are not members of the pueblo shall not take effect until it has been approved by the Secretary of the Interior or some officer designated by him." IV G. Fay, *Charters, Constitutions and By-laws of the Indian Tribes of North America* 85, 87 (1967).

The respondents cite *United States v. Wheeler,* 435 U.S. 313 (1978), and *Williams v. Lee,* 358 U.S. 217 (1959), for the proposition that this Court has "recognized" the Navajo Tribe's governmental powers. *Respondents' Brief* at 8, 12, 20, 23 and 24. Neither of these cases, however, suggested that the Navajo Tribal Council may exercise its power without Secretarial approval. To the contrary, in *Wheeler* this Court explicitly observed that "the present

[16]In the event that the Oklahoma cases on which the *Merrion* Court relied were now held to be limited to the Five Civilized Tribes of Oklahoma, the holding in *Merrion* that all Indian tribes have an inherent power to tax would be based on inapposite authority. In addition, any finding that the Navajos have inherent power to tax would be precluded by the undisputed historical facts (1) that the Navajo Tribe never had any history of tribal self-government, much less any history of taxing or exerting other forms of coercive governmental authority *(Petitioner's Brief* at 26 n.17), and (2) that its government was created by federal regulations promulgated by the Secretary of the Interior *(Petitioner's Brief* at 25-26).

[Navajo] Tribal Code was approved by the Secretary of the Interior *before becoming effective.*" 435 U.S. at 327 (emphasis added). In *Williams,* this Court had explained that "To assure adequate government of the Indian tribes it [Congress] enacted comprehensive statutes in 1834 regulating trade with Indians and organizing a Department of Indian Affairs." 358 U.S. at 220. Indeed, the Navajo Courts of Indian Offenses to which the *Williams* Court referred were not tribal courts at all, but rather were courts established and maintained by the Bureau of Indian Affairs.[17] 22 Fed. Reg. 10516 (December 24, 1957). The Navajo Tribe did not promulgate its own law and order code until after *Williams* had been decided, and that code was approved by the Secretary of the Interior on February 11, 1959. *Oliver v. Udall,* 306 F.2d 819, 821-822 (D.C. Cir. 1962), *cert. denied,* 372 U.S. 908 (1963).

In conclusion, each of the above cases cited by respondents supports the requirement of Secretarial approval for the Navajo tribal taxes at issue in this case.

IV. Unorganized Tribes Cannot Supersede Secretarial Supervision Of Oil And Gas Leases.

Both the United States and the respondents vigorously dispute that tribal taxation of oil and gas operations

[17]This Court has specifically recognized the difference between "tribal courts" and " 'CFR Courts' operating under the Code of Federal Regulations, 25 C.F.R. § 11.1 *et seq.*" *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 196 n.7 (1978). *See also United States v. Clapox,* 35 F. 575 (D.Or. 1888). In the preamble to Resolution No. CO-69-58, *reprinted in Navajo Tribal Code,* Vol. II, p. 277 (1978), the Navajo Tribal Council acknowledged that its earlier resolutions attempting to appoint tribal judges "were disapproved by a former Commissioner of Indian Affairs, Dillon S. Myer, in a letter of March 3, 1953 (Law and Order 879-53, 880-53), holding that judges on the Navajo Reservation are not tribal judges, but are judges of courts established by the Department of the Interior, and that their authority to act is derived from regulations of the Department of the Interior. . . ."

by unorganized tribes has been superseded by the Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a *et seq.,* and the regulations promulgated thereunder, 25 C.F.R. Part 211. *United States' Brief* at 21-24; *Respondents' Brief* at 31-46. However, neither has bothered even to cite, much less to address, the judicial authority—*Kennerly v. District Court,* 400 U.S. 423 (1971)—upon which petitioner has relied. And neither has even attempted to explain how "harmonization" between the Mineral Leasing Act of 1938 and the IRA is achieved by allowing both the Secretary and unorganized tribes to ignore "the administrative process established by Congress to monitor such exercises of tribal authority." *Merrion,* 435 U.S. at 155.

Rather, they attempt to respond to petitioner's argument only after mischaracterizing it. For example, the respondents claim that 25 U.S.C. § 396d merely "authorizes Secretarial regulation of lease operations." *Respondents' Brief* at 32. To the contrary, this section *requires* Secretarial regulation and further requires that all operations be subject to that Secretarial regulation. In fact, the mandate in 25 U.S.C. § 396d is far stronger than the authorization in 25 U.S.C. § 261 for the Commissioner of Indian Affairs "to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians." Yet, the Solicitor has previously concluded[18] that this authority on the part of the BIA in

[18]The United States now argues that the Solicitor's Opinion was wrong. *United States' Brief* at 19-21. It is simply astounding how the United States can dispute the correctness of the very Solicitor's Opinion on *Powers of Indian Tribes,* 55 I.D. 14 (1934), on which this Court relied in *Merrion.* 455 U.S. at 139. Again, the argument is apparently that this Court should respect and defer to contemporaneous administrative interpretations that the United States finds to its liking, but it should ignore and disregard those contemporaneous administrative interpretations that the United States does not now like. *See* footnote 8 *ante.*

the context of Indian traders means that "an Indian tribe is without power to levy a tax upon such licensed traders unless authorized by the commissioner of Indian Affairs so to do." *Powers of Indian Tribes,* 55 I.D. 14, 48 (1934) *reprinted in* I *Opinions of the Solicitor of the Interior Relating to Indian Affairs* 445, 466. Given the even greater Congressional mandate of Secretarial supervision and regulation over oil and gas leases enacted four years later, Secretarial approval over tribal taxation is more compelling in the case of oil and gas leases than in the case of Indian traders.

Both the United States and the respondents challenge the Secretary's interpretation and implementation in 25 C.F.R. § 211.29 of the distinction Congress drew in 25 U.S.C. § 396b between organized and unorganized tribes.[19] The United States contends that "there is no reason to suppose the Court [in *Merrion*] considered these provisions critical." *United States' Brief* at 23 n.21. The respondents challenge the scope of 25 C.F.R. § 211.29 as being "obviously broader than the proviso in [25 U.S.C. § 396b]" (*Respondents' Brief* at 35 n.16), and suggest that it is just "an exercise of the Secretary's own regulatory discretion." *Id.* There is no basis for these assertions. Indeed, respondents' attempt to rely on 25 C.F.R. § 11.1(e) is misplaced, for that regulation requires tribal ordinances to be approved by the Secretary of the Interior before they can supersede Secretarial provisions. In short, both the United States and the respondents ask this Court to invalidate the Secretary's own interpretation in 25 C.F.R. § 211.29, which permits only organized tribes in accord-

[19]Elsewhere, the respondents inscrutably urge that "The Secretary's interpretation of the Act is entitled to great weight. . . ." *Respondents' Brief* at 41 n.19.

ance with their tribal constitutions to supersede Secretarial regulation of oil and gas leases.

There is little dispute that the taxes interfere with the Secretary's regulation of oil and gas leases.[20] Even a novice in semantics can easily appreciate that the Secretary's regulations on lease cancellation are circumvented by the tax provisions that, according to respondents, call for exclusion from the reservation or suspension of rights to do business. *Respondent's Brief* at 43 n.21. Nor is it difficult to appreciate that the Secretary's economic supervision and oversight responsibilities are disrupted by the claimed unilateral right of the Navajo Tribe to determine at what rate it will tax in any given year.

In short, if Indian tribes are permitted unilaterally to circumvent the scheme of both initial and continuing Secretarial supervision over oil and gas leases required by the Congress in 25 U.S.C. § 396d, then no lease with an Indian tribe is worth the paper on which it is written. The ineluctable result is that the very purpose of the Mineral Leasing Act of 1938—to maximize tribal revenues through the leasing of mineralized lands—will be frustrated since few, if any, responsible companies will commit to substantial capital investments on the economic terms of a negotiated lease that can be unilaterally changed by the other party without any limitation whatsoever. *See Yavapai-Prescott Indian Tribe v. Watt,* 707 F.2d 1072, 1075 (9th Cir.), *cert. denied,* — U.S. —, *as reprinted in* 52 U.S.L.W. 3461 (1983).

[20]The respondents err in their assertion that "the Secretary has determined that nothing in his regulations conflicts with tribal tax laws." *Respondents' Brief* at 36 n.16.. The Secretary has never even analyzed the Navajo Tribe's Business Activity Tax and Possessory Interest Tax. Indeed, the respondents acknowledge elsewhere in their brief that the taxes at issue in this litigation are not covered by the review process set forth in the Secretary's "guidelines". *Id.* at 28-29.

CONCLUSION

The constitutional form of government, which prevents the unlimited exercise of sovereign power, has made this Nation the envy of the modern world. There could be no greater irony than to fashion a new rule of law that permits absolutely unlimited exercise of governmental powers on millions of square miles of land owned in fee by the United States itself.

The Ninth Circuit has eliminated federal supervision and control precisely where it is most urgently needed. The decision below trivializes this Court's decision in *Merrion v. Jicarilla Apache Tribe*, trivializes the Indian Reorganization Act of 1934 and disregards the traditional federal supervision over intercourse between Indians and non-Indians that the Congress explicitly continued in 25 U.S.C. § 396d.

The Ninth Circuit's decision below must be reversed.

January 30, 1985

Respectfully submitted,

ALVIN H. SHRAGO (Counsel of Record)
STEPHEN D. TREUER
EVANS, KITCHEL & JENCKES, P.C.
2600 North Central Avenue
Phoenix, Arizona 85004-3099
Tel. (602) 234-2600

Counsel for Petitioner
Kerr-McGee Corporation

APPENDIX TO REPLY BRIEF FOR PETITIONER

TABLE OF CONTENTS

APPENDIX AA

UNITED STATES DEPARTMENT
OF THE INTERIOR

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

December 5, 1983

CERTIFIED MAIL—RETURN RECEIPT
REQUESTED

Ivan Sidney, Jr.
Tribal Chairman, Hopi Tribe
P.O. Box 123
Oraibi, Arizona 86039

Dear Mr. Sidney:

This letter constitutes my decision to veto Hopi Coal Severance License Fee Ordinance No. 38, enacted by the Hopi Tribal Council on September 7, 1983. Although in this instance, I am required by the Guidelines for Review of Tribal Ordinances Imposing Taxes on Mineral Activities to veto a tribal severance tax, I remain committed to encouraging tribes to exercise their taxing powers within their legal authority to do so. I am also committed, of course, to assisting the Hopi Tribe in securing maximum return from production of its mineral resources, and I therefore offer my services and those of my staff toward achieving that goal.

The Guidelines mandate disapproval of an ordinance which violates federal law. By memorandum of December 5, 1983 (copy enclosed), the Solicitor has advised me that Hopi Ordinance 38 violates federal law, specifically, the Navajo and Hopi Settlement Act and the due process provision of the Indian Civil Rights Act. The Solicitor's memorandum is hereby incorporated into my decision.

Other challenges to the Hopi ordinance included arguments that it violates the Interstate Commerce Clause and

that the Hopi constitution does not expressly authorize the tribe to tax. The Solicitor did not address these issues. Their resolution is not necessary to my decision, which rests solely on the grounds that the ordinance is violative of the Navajo and Hopi Settlement Act and the due process provision of the Indian Civil Rights Act.

This decision is final for the Department.

Sincerely,

/s/ KEN SMITH
Assistant Secretary -
Indian Affairs

Enclosure